IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1940

No. [redacted] 303

ELLEN BORDEN STEVENSON,

Petitioner,

vs.

ELLEN W. CARPENTER, ADLAI E. STEVENSON III, BORDEN STEVENSON AND JOHN FELL STEVENSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Now comes the petitioner by her attorneys, Benjamin S. Adamowski, Robert E. Adamowski, Paul D. Newey and Francis X. Riley, who pray that this court issue its Writ of Certiorari to the Supreme Court of Illinois to review the final order of that court, and allege as follows:

OPINION.

The opinion of the court below appears in the appendix to this petition. It has not as yet been reported.

JURISDICTION.

1. The final order was entered March 24, 1970.

2. This petition for review of the order of the court below is filed pursuant to Section 1257(3) of Title 28, Judiciary and Judicial Procedure. (28 USCA 1257(3).)

QUESTIONS PRESENTED.

1. Is Section 112 of Illinois Probate Act repugnant to the Due Process clauses of the 5th and 14th Amendments, by defining as "incompetent", "any person who because of old age, physical incapacity, *imperfection of* or deterioration of *mentality* is incapable of managing his person or estate,". (Emphasis supplied.)

2. Was petitioner deprived of her property without due process of law, when the court denied her the right of defense in this cause, by applying the sanction provided in Rule 219(c) of the Rules of the Supreme Court, for her refusal to submit to an examination of her mental condition, pursuant to Rule 215(a) of that court, when she herself, had not put her mental condition in issue?

STATUTES INVOLVED.

Section 112 of Probate Act (Ill. Rev. Stat. 1963, Ch. 3, Par. 112), reads as follows:

> "INCOMPETENT" defined.
>
> The word "incompetent" in this Act includes an insane or mentally ill person, an idiot, an imbecile, feeble minded or mentally deficient person, any person who because of old age, physical incapacity, or imperfection or deterioration of mentality is incapable of managing his person or estate and any person who because of gambling, idleness, debauchery or the excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering.

Rules 215(a) and 219(c) of the Rules of the Supreme Court of Illinois (Ill. Rev. Stats. 1969, Ch. 110A, Pars. 215(a) and 219(c)), read as follows:

Physical and Mental Examination of Parties and Other Persons.

Notice; Motion; Order. In any action in which the physical or mental condition of a party or of a person in his custody or legal control is in controversy, the court upon notice and for good cause shown on motion made within a reasonable time before the trial, may order the party to submit to a physical or mental examination by a physician suggested by the party requesting the examination, or to produce for such examination the person in custody or under legal control who is to be examined. The court may refuse to order examination by the physician suggested but in that event shall permit the party seeking the examination to suggest others. A party or person shall not be required to travel an unreasonable distance for the examination. The order shall fix the time, place, conditions, and scope of the examination and designate the examining physician.

Rule 219; Consequences of Refusal to comply with Rules or Order Relating to Discovery or Pre-Trial Conferences.

(c) *Failure to Comply with Order or Rules.* If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provision of rules 201 through 218, or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) that further proceedings be stayed until the order or rule is complied with;

(ii) that the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) that he be debarred from maintaining any

particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) that a witness be barred from testifying concerning that issue;

(v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his suit be dismissed with or without prejudice; or

(vi) that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.

These rules have the force of law. (Ill. Rev. Stats. 1969, Ch. 110, Par. 2.)

STATEMENT OF THE CASE.

Chronology.

A. The Pleadings.

The plaintiffs, Ellen W. Carpenter, Adlai E. Stevenson, III, Borden Stevenson and John Fell Stevenson filed a petition in the Probate Court of Cook County on May 15, 1964. (R. 4.) The petition prayed that the court determine the fitness of the defendant, Ellen Borden Stevenson, to manage her own estate within the meaning of Ill. Rev. Stats., Ch. 3, Sec. 112. (R. 5-6.)

In support of this prayer, plaintiffs alleged that defendant was the daughter of Mrs. Carpenter and the mother of the Stevenson boys. (Par. 1, R. 4.) It was alleged that due to an imperfection of defendant's mentality she was incapable of managing her own estate (Par. 2; *id.*); that her assets total $100,000 with liabilities in excess of $80,000 (Par. 3; *id.*), which allegedly represented a $400,000 diminution of assets over a fourteen (14) year period. (Par. 5; *id.*)

The petition further alleged defendant was suffering mental and emotional disturbances manifested by extreme jealousy, suspicion and hostility (Par. 4; *id.*); that she was harassed by claims of creditors (Par. 6; *id.*); that all of the generous offers of help from plaintiffs had been rejected. (Par. 7; R. 4-5.) The petition further charged that defendant's estate lay open to immediate waste (Par. 8; *id.*), and as a last regretful attempt to help, this petition was filed. (Par. 9; *id.*)

On May 15, 1964, the Honorable Robert Jerome Dunne, waiving notice to the defendant, appointed the Continental Illinois National Bank and Trust Co. of Chicago, conservator to collect of the estate of Ellen Borden Stevenson, alleged incompetent. (R. 13.)

The defendant immediately, on notice, moved to dismiss the petition and vacate the order of May 15, 1964 (R. 19), and, filed a jury demand. (R. 20A.) Her motion was denied on June 2, 1964 and she was granted 30 days to answer. (R. 22.)

On July 1, 1964, she filed her answer. (R. 46-49.) She denied her alleged incapability to manage her own estate (Par. 2; R. 46); the value of her estate as alleged by petitioners (Par. 3; *id.*); her emotional state as alleged in the petition (Par. 4; *id.*); the generosity of petitioners' offers of help (Par. 7; R. 47-48); the possibility of immediate waste to her estate (Par. 8; *id.*); and her alleged refusal to allow her financial affairs to be guided by a competent professional. (Par. 9; *id.*) Defendant prayed that the petition be dismissed. (*id.*)

On June 26, 1964, based on the petition of the conservator to collect (R. 29-32) and the answer of defendant (R. 33) Judge Dunne ordered the conservator to collect to manage and to operate defendant's farm (Par. 1; R. 4-25); her residence (Par. 2a; R. 26); claims against her (Pars. 2b-d;

id.); claims on her behalf (Par. 2e; *id.*); and all future claims by or against her. (Par. 2f; R. 27.) On June 30, 1964 the conservator to collect filed its reply to her answer. (R. 27.)

Subsequent to a substitution of attorneys (R. 471) respondent by new counsel moved, on October 27, 1965, for leave to withdraw her Answer to the petition to appoint a conservator to collect (Par. 1; R. 475) and for the court to grant a hearing on defendant's motion to strike the petition (Par. 2; *id.*); on constitutional grounds. (Par. 3; *id.*) On November 1, 1965 this petition was denied. (R. 481.)

On February 11, 1966 plaintiffs petitioned the court for the appointment of a guardian *ad litem* for defendant. (R. 555.) One week later on February 18, 1966 the court appointed Ira D. Schultz and Leo K. Wykell, guardians *ad litem*. (R. 560.) On February 28, 1966 defendant filed a document setting out lack of notice of the hearing on the appointment. (R. 563.)

B. Discovery.

Plaintiffs filed a petition for the appointment of three psychiatrists to examine defendant on September 28, 1964. (R. 164.) The petition alleged defendant's mental condition to be in issue (Par. 1; *id.*); the nature of the proceedings required the court and jury to be supplied with such information (Par. 2; *id.*); and that Supreme Court Rule 17-1 (now 215) provides for such examination. (Par. 3; *id.*)

Defendant answered on October 1, 1964 denying each of the allegations (R. 175), and asking dismissal of the petition. (R. 177.)

An amended petition, by leave of Court (R. 179), for the appointment of three psychiatrists was filed on October 28, 1964. (R. 181.) Defendant answered it, November 10, 1964. (R. 224.)

Plaintiffs then moved for leave to file an affidavit in support of their petition for these appointments. (R. 260.) The affidavit was supported by a truncated recording of a telephone conversation between affiant and his mother. (R. 265-270.) This motion was allowed on January 27, 1965. (R. 272.) Defendant's motion to strike the affidavit (R. 275) was denied.

Plaintiffs moved for (R. 285) and leave was granted to (R. 296) file an additional affidavit in support of petitioners request for psychiatric examination (R. 287-94) to correct certain typographical errors existing in the transcript originally filed. (R. 265-70.)

Defendant filed a counter-affidavit on February 5, 1965 (R. 279-84) including certain letters (R. 282-83) reflecting her relationship with Adlai E. Stevenson III, her oldest son.

Over her cogent objections (R. 298-304) an order compelling respondent's submission to psychiatric examination was entered on February 24, 1965. (R. 392.) On plaintiffs' motion (R. 402) the Court amended its order (R. 405) providing that if defendant's mental examination was by the three named psychiatrists (Par. 2; R. 405; Par. 1; R. 412; Par. 1; R. 425) as a panel, a majority decision governed (Par. 7; *id.*), and that the results of the examinations were to be used only for discovery purposes. (Par. 10; *id.*)

The defendant's request to have her counsel present while she was examined was denied. (Par. 12; *id.*)

In support of her motion to vacate this order (R. 414), which was denied on May 5, 1965 (R. 420), defendant included as an exhibit a letter from one of the three named psychiatrists, who had, one year previously, said she was competent. (R. 418.)

Notice of deposition for June 11, 1965, was served on defendant. (R. 427.) After two continuances at her request

(Pars. 2 and 3; R. 447) defendant failed to appear. Plaintiffs moved that she be compelled to present herself for the mental examination (R. 447-456), under penalty of the sanction provided in Supreme Court Rule 19(12). (Now Rule 219.) (R. 449.) The motion was granted on October 1, 1965. (R. 458.) On the same date the matter was set for trial. (R. 462.) On October 14, 1965, defendant's effort to reset the date of the deposition failed. (R. 464.)

Defendant appeared for her deposition on October 27, 1965 before a battery of plaintiffs' attorneys. (R. 497.) On advice of counsel she answered only as to her name and address and refused to respond to any further questions. (R. 499, 504.)

Based on this counsel-advised refusal to answer and her failure to appear for psychiatric examination, plaintiffs filed a motion asking imposition of certain sanctions as provided in Rule 19-12(3). (Now Rule 219(c)(iii)), of the Rules of the Supreme Court. (R. 509.) After recitation of the reasons for this much regretted action (Pars. 1-16; *id.*) plaintiffs prayed that respondent be debarred from maintaining any defense, by evidence testimonial, physical or documentary, with regard to: her assets and liabilities; present state of financial affairs; financial and medical assistance from plaintiffs; instances wherein she allegedly demonstrated mental or emotional disturbances by acts towards plaintiffs; her present and past ability to manage her own funds; and, telephone conversations, letters and documents among all of the parties. (Prayer 1-8; R. 514-15.)

Defendant met this motion by a "Brief of Law" filed on November 16, 1965. (R. 519.)

Petitioners replied with their own "Memorandum of Law" (R. 524), on November 30, 1965. On that same day the Court below decided the question (R. 534-37) reciting

almost verbatim the prayer of petitioners' motion. (Compare: 1 to 8, R. 514; and (a) to (f) R. 536-37.) The order further prohibited the parties from informing the jury of these restrictions. (R. 537.)

ISSUES AND PRETRIAL PROCEDURES.

A. The Pleaded Issue.

The immediate family, both ascending and descending generations (Par. 1; R. 3), of Ellen Borden Stevenson charged, in an unverified complaint, that she "is incapable of managing her estate because of an imperfection of mentality." (Par. 1; R. 3.) If so, she was within one of the statutory definitions of "incompetent." (Ill. Rev. Stats. 1963, Ch. 3, Par. 112.)

B. Trial Procedure and Final Order.

On February 11, 1966, the plaintiffs petitioned for the appointment of a guardian *ad litem* for defendant. (R. 555.) The basis of the petition was the defendant's hiring and losing four sets of attorneys, which has delayed the trial of this case. (*id.*)

On February 18, 1966 (R. 560) the court appointed attorneys Ira D. Schultz and Leo K. Wykell, as guardians *ad litem*, "to represent her in said proceedings." (R. 561.) The order recited notice to defendant by telegram. (R. 560.) Pretrial notice for February 28 was sent to defendant, who replied on February 28, 1966 challenging the court's jurisdiction to proceed. (R. 563-68.)

On March 10, 1966 the guardian *ad litem*, "at the conclusion of all the evidence, "* * *, moves the court to instruct the jury to find in favor of defendant." (R. 572.) The plaintiffs moved for a directed verdict "on all the issues." (R. 574.) The court denied the motion, and the

instructions. (*id.*) On that day the jury found "that because of an imperfection of mentality [defendant] is incapable of managing her estate." (R. 593.)

On March 11, 1966 the court entered an "order of adjudication of incompetency and appointing conservator." (R. 595.) On April 27, 1966 the defendant filed a motion for a new trial (R. 611), and judgment notwithstanding the verdict. (R. 613.) On that same date an amendment to the motion was filed (R. 615), by leave of court. The motions were denied on May 27, 1966. (R. 660.) On June 27, 1966 the defendant filed a Notice of Appeal from the order of March 11, adjudging the defendant incompetent. (R. 715.)

C. The Trial

The trial consisted of the hearsay testimony of Adlai E. Stevenson III regarding his mother's difficulties financially, and the introduction of partial recordings of telephone conversations he had with her. (R. 955-1411.) The hearsay portion of the testimony was that the petitioner had refused to give the respondents access to any of her records. They had no authoritative, competent evidence to prove the allegations of their complaint. The other sons, respondents, and the wife of Adlai III also testified to difficulties with the petitioner, but with no relevant evidence of any kind as to her ability to manage her affairs. (R. 1412, 1460, 1536, respectively.) The burlesque of the trial is contained in the testimony of a psychiatrist who gave what he called "a diagnostic impression".

William Offenkrantz is a doctor of medicine, specializing in psychiatry. (R. 1575.) He said he had listened to the tapes admitted into evidence. He had read the wire and letters written by defendant. (R. 1587.) He listened to a hypothetical question based upon plaintiff Adlai's testimony. (R. 1590-97.) His opinion was that defendant "does

suffer from an imperfection and deterioration of mentality." (R. 1598.) He concluded this because:

1. She is unable to control her emotions of rage and hostility.

2. She has no shame or remorse.

3. It is abnormal for a mother to threaten to ruin her son.

4. She threatens to ruin the Democratic party.

5. Her vocabulary shows she is "of high intelligence." Her cursing shows deterioration.

6. She has a persecution complex.

7. She identifies with Mary Lincoln; and the people of the United States, France and Canada are on her side.

8. She is unable to follow logic; her thoughts are contradictory.

9. She blames someone or something for her difficulty—never herself. (R. 1601-03.)

10. She confuses thought with reality. (R. 1603.)

He said he never met the defendant, nor was acquainted with her. He never treated nor examined her. (R. 1612.) He has, however, discussed her at length with plaintiffs' attorney. (*id.*)

He said his opinion was not a diagnosis. "I would be unable to make a diagnosis for lack of sufficient information." (R. 1613.) "*I have given a diagnostic impression.*" (*id.*)

ARGUMENT.

A Writ of Certiorari should issue in this case because: (1) the Illinois statute is unconstitutionally vague; and (2) the trial court denying petitioner the right to defend herself deprived her of due process of law.

1. This case was instituted with a petition which prayed that the court "ascertain whether [defendant] is incapable of managing her estate," and if so, appoint a bank as conservator. (E. 3-4.) The basis for the prayer was that defendant "is incapable of managing her estate because of an imperfection of mentality." (Ch. 3, Par. 112; Par. 2, E. 1.) The jury found her incompetent "because of an imperfection of mentality." (E. 193.) The court then found that "because of an imperfection of mentality" defendant was incapable of managing her estate (Par. 2, E. 194), and adjudged that defendant "is an incompetent" and appointed a conservator for her. (E. 194-195.)

Both the Federal Constitution (amends. 5 and 14, Sec. 1) and the Illinois Constitution (Art. 2, Sec. 2), deny the State of Illinois the right to deprive this defendant "of life, liberty, or property, without due process of law." "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it * * * leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402-03 (1965). This standard is the same whether civil or criminal statutes are in issue. (*id.* at 402.) Nor do "subsequent state court interpretations [provide] standards and guides * * * to cure the former constitutional deficiencies." (*id.* at 403.) Accord: *Ashton* v. *Kentucky*, 384 U. S. 195, 198.

"Vague laws in any area suffer constitutional infirmity."

(*id.*, at 200.) And, the Supreme Court of Illinois agrees and has done so repeatedly.

"Due process of law * * * requires that an act shall not be vague, indefinite or uncertain, and must provide sufficient standards to guide the administrative body in the exercise of its functions." *People ex rel. Stamos* v. *Public Bldg. Com.*, 40 Ill. 2d 164, 174. For "administrative body" read "judges and jurors" in the full application of this principle. 382 U. S. at 402-03.

The constitutional principles urged upon the court here, as applied to Section 113 of the Probate Act, were fully expressed by that Court in *Hill* v. *Relyea*, 34 Ill. 2d 552, where the court said at 555;

> "There is a distinction between the delegation of true legislative power and the delegation to a subordinate of authority to execute the law. (*Lyddy, Inc.* v. *City of Chicago*, 356 Ill. 230, 190 N. E. 273.) The former involves a discretion as to what the law shall be; the latter is merely an authority or discretion as to its execution, to be exercised under and in pursuance of the law. (*People* v. *Warren*, 11 Ill. 2d 420, 143 N. E. 2d 28; *City of Evanston* v. *Wazau*, 364 Ill. 106 A. L. R. 789; *McDougall* v. *Lueder*, 389 Ill. 141, 58 N. E. 2d 899, 156 A. L. R. 1058.) It is an established rule that the General Assembly cannot delegate its general legislative power to determine what the law shall be. However, it may delegate to others the authority to do those things which the legislature might properly do, but cannot do as understandingly or advantageously. (*Board of Education* v. *Page*, 33 Ill. 2d 372, 211 N. E. 2d 361; *People ex rel. Daesch* v. *Mayor of Belleville*, 22 Ill. 2d 226, 174 N. E. 2d 678; *City of Evanston* v. *Wazau*, 364 Ill. 198, 4 N. E. 2d 78, 106 A. L. R. 789.) Absolute criteria whereby every detail necessary in the enforcement of a law is anticipated need not be established by the General Assembly. The constitution merely requires that intelligible standards be set to guide the agency charged with enforcement, (*Memorial*

Gardens Ass'n., Inc. v. *Smith*, 16 Ill. 2d 146, 156 N. E. 2d 587; *People* v. *Warren*, 11 Ill. 2d 420, 143 N. E. 2d 28) and the precision of the permissible standard must necessarily vary according to the nature of the ultimate objective and the problems involved."

Accord: *DeGrazio* v. *Civil Serv. Comm.*, 31 Ill. 2d 482, 485; *Hershey Mfg. Co.* v. *Adamowski*, 22 Ill. 2d 36, 43-44; *Memorial Gardens Ass'n.* v. *Smith*, 16 Ill. 2d 146, 131; *People ex rel. Adamowski* v. *Land Clearance Com.*, 14 Ill. 2d 74, 80, 82.

The words (and concept) in issue in this case, are those used in Section 112 of the Probate Act (Ill. Rev. Stats. 1965, Ch. 3), which took defendant's property from her, because she lost money through "an imperfection of mentality." The words, of course, in legal terms are gibberish. We are imperfect beings *vis-a-vis* a Perfect Being. We are imperfect in fact, talent and attainment by nature. We are imperfect because of limited attainment. Imperfect can also mean "impaired," as in "damaged;" it can mean "stultified" as in "retarded;" it can mean "disoriented" as in "chemical deficiency;" it can mean "fevered" as in "diseased." But, the word itself can and does mean nothing in terms of measuring the conduct of a specific human being.

Thus, the petitioner here in losing her property can complain that, "not only do[es] the [statute] lack standards, but that such standards are completely absent." (*Barnes* v. *Merritt*, 5 Cir., 375 F. 2d 8, 11.) This court has said that "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process," (*Baggett* v. *Bullitt*, 377 U. S. 360, 367) applies with devastating force to the statute penalizing "an imperfection of mentality."

And, a review of the history of the statute adds to the confusion, rather than clarifies it.

Originally (Ill. R. S., 1874, Ch. 86, Par. 1), conservators were appointed for idiots, lunatics, distracted persons and drunkards who could not manage his person or his estate. In 1919, this Act was refined down to insane persons, or a drunkard, a spendthrift or otherwise incompetent person. (Ill. Laws, 1919, p. 592, Par. 1.) In Section 52 of that Act (*id.*, Par. 52, p. 598) the legislature defined:

1. Insane Person as an "idiot, *non compos*, lunatic, feeble-minded, distracted, or mentally incompetent person."

2. Spendthrift as "a person, * * * who * * * on account of excessive drinking, excessive use of drugs, gaming, idleness or debauchery" cannot manage his estate.

3. Incompetent as a "person who by reason of any mental or physical incapacity * * * is incapable of managing his estate."

4. Drunkard, who "on account of excessive drinking of intoxicants cannot manage his estate," and leaves his family in want. (Ill. Rev. Stats., 1939, Ch. 86, Par. 53.)

In 1939, a comprehensive amendment of the Probate Act was undertaken. (See, Illinois Probate Act Annotated, William M. James, Foundation Press, 1940.) The action word had then become "incompetent." (Ill. Rev. Stat. 1939, Ch. 3, Par. 112.) It included:

1. An insane person, an idiot, an imbecile.

2. "Any person who because of:"
   a. old age;
   b. physical incapacity;
   c. deterioration of mentality;

d. imperfection of mentality; "is incapable of managing his estate."

3. Any person who because of:

a. gambling;
b. idleness;
c. debauchery;
d. excessive use of intoxicants or drugs; "exposes himself and his family to want."

The annotation claimed that this amendment incorporated the former Section 53, "with some changes of language and substance." The "substance" obviously was the adoption of the phrase, "imperfection or deterioration of mentality." The revision and consolidation (Ill. Prob. Act. Ann., p. vii) of the then "probate law" explained that the term "incompetent" was a subjective term. That is, "after a determination of its existence to signify one who for any one or more of the reasons enumerated is incapable of managing his estate." (*id.*, at p. 114.)

This *a posteriori* approach to "incompetency" has ostensibly been accepted by the Illinois Court. *Macdonald* v. *LaSalle Nat. Bank*, 11 Ill. 2d 122, 124. "The test which is universally applied in determining judicially whether a conservator should be appointed is whether the person is capable of managing his own affairs." Affirmed, *Loss* v. *Loss*, 25 Ill. 2d 515, 517. Each of these cases adjudicated the question of the physical incapacity of elderly women to manage their estates. Thus, ostensibly that court has decided no more than that issue in appraising this statute.

The issue here is the unconstitutional standard for depriving defendant of her property, which may be established by: (a) the impossibility of proof of "imperfection of mentality;" and, (b) the amorphous objective to attain. First, by the old or the new terminology the plaintiffs did

not try to prove that defendant was insane, *non compos*, an idiot, an imbecile, a distracted person, a drunkard, a spendthrift, or incompetent because of a mental or a physical incapacity.

They did charge her with (Par. 2), and the jury did find her guilty of, "incompetence" because of an "imperfection of mentality." According to the evidence, her liabilities exceeded her assets. She had lost money in an Art Center venture. Her stock investments were liquidated by a bank, when the stock market crashed in 1962. She had an intense dislike for her mother and for her older son. She didn't open the door for another son, who came in from out of town unannounced, and rang her doorbell. Her third son used force on her to restrain her from physically expressing her animosity to her mother. She disapproved of her older son's marriage. She disliked her daughter-in-law. She was boorish about his home and his family, in two visits to his home. She called him a "goddamn bastard." A psychiatrist made *an impressionistic diagnosis* of her from selected secondary sources.

From this potpourri of consistent disapproval of her family and its conduct toward her, twelve strangers reached a verdict that, from selected secondary sources, said she had an "imperfection of mentality." She was, therefore, "incompetent" and, therefore "incapable of managing her affairs," the court concluded by order. To review the foregoing evidence and its irrelevant conclusion, is to condemn it. None of it, from maternal revulsion through dislike of photographers to an unpaid grocery bill, was relevant to her mental ability to conduct her affairs.

Surely, this conglomeration of evidence was the direct result of a lack of guideline for all concerned. It was impelled by the impossibility of defining "imperfection of mentality." The very phrase is vague, indefinite and un-

certain. Last, and obviously, its most fatal weakness was that the phrase means exactly what each individual intends it to mean. This leaves the substance of the law to be that which the subjective selection of judge and juror says it is. Thus, it is constitutionally void. *Giaccio*, 382 U. S. at 402.

Nor does the court below make any objective effort to assume a standard for the statute, nor to interpret it in such a way so as to supply a standard. It argues, that when subjectively a person cannot manage his estate it's because of "an imperfection of mentality."

The justification for the appointment of a conservator is founded primarily on the incapability of managing one's person or estate and not on the cause of that incapability. (*Loss* v. *Loss*, 25 Ill. 2d 515; *Macdonald* v. *LaSalle National Bank*, 41 Ill. 2d 122.) Thus, in the case before us, it is not the imperfection of mentality per se which would justify the appointment of a conservator, but rather the inability to manage one's estate due to such imperfection of mentality. This, of course, proves too much. It proves: (a) the need for a psychiatric examination was unnecessary because the loss of her money proved petitioner's "incompetence;" and, (b) mere monetary loss if large enough to be family-embarrassing, establishes "incompetence," and, therefore, "imperfection of mentality." Constitutional due process requires much more than bad logic to establish a standard upon which petitioner loses control of her property. "Vague laws in any area suffer constitutional infirmity." *Ashton*, 384 U. S. at 200.

2. The plaintiffs, moved for (R. 164) and the court ordered (R. 425) the defendant, pursuant to Rule 215 of the Rules of the Illinois Supreme Court (then Rules 17-1 and 17-2) to submit to a mental examination. At first, the courts ordered three psychiatrists to make the examination

(R. 392), but the order ignored by defendant, and which resulted in the sanction (R. 536), directed her to appear before one psychiatrist. (R. 425.)

At the outset, recourse to the history of the adoption of Rule 215, will demonstrate the limitations of scope and purpose of it. The Illinois General Assembly has twice refused to adopt a civil practice provision authorizing the court to adopt rules permitting the "physical or mental examination of parties." It did so first in 1933 and again in the general revision in 1955. (See, Sec. 58(1), H. B. 439, 69th G. A., and; 46 Ill. Bar Journal 687, 694.)

In 1957, the Illinois court denied a Writ of Mandamus to expunge Circuit Court order for plaintiff to submit to a physical examination. *People ex rel. Noren* v. *Dempsey*, 10 Ill. 2d 288. In denying the writ, this court said, that "when one seeks to recover damages on the basis of his physical injuries he puts his physical condition in issue," (*id.* at 293.) One of the compelling reasons for upholding the court order, was its power "to regulate judicial procedure." (*id.*)

Thus, this court subsequently adopted Rule 215 exercising its inherent power, and consistent with the legislative authority "to make rules of pleading, practice and procedure * * *." (Ill. Rev. Stats. 1967, Ch. 110, Par. 2.) This then is a rule of "discovery," whose purpose "is not to provide an expert witness for a litigant. Its purpose is one of discovery." *Jackson* v. *Whittinghill* (3rd Dist.), 39 Ill. App. 2d 315, 324.

Here, however, the respondents had already charged under oath that petitioner was mentally incompetent. In order to prove what they had already asserted under oath, they needed an expert witness. In order to get that expert, it was necessary for them to force defendant to submit to that examination. This violates the two basic conditions of an order permissible under Rule 215.

The court lacked jurisdiction to enter the order, because the mental condition of the defendant (a party) was not "in controversy," and the request was not made in "good faith." These three conditions parallel those in FRCP 35 (28 USCA), so that the federal decisions are relevant to the issue here. (See, SHA Stat. Ch. 110A, Par. 215, note p. 201.)

In *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964) certain injured bus passengers sued the Greyhound Corporation, Schlagenhauf, its driver, Contract Carriers and the driver of its tractor and the owner of the trailer, with which the bus had collided. All defendants answered denying negligence. Greyhound cross-claimed against Contract Carriers. In its answer Contract charged that Schlagenhauf was negligent, and alleged that he "was not mentally or physically capable" of driving a bus. It moved for a mental and physical examination of him. (*id.*, at 106-07.) The court ordered Schlagenhauf to submit to the mental and physical examinations. He applied for a Writ of Mandamus, which the Court of Appeals refused. (321 F. 2d 43.) This Court granted *certiorari*. (*id.*, at 109.)

The court held that the issue of ordering a defendant to submit to physical and mental examinations, were issues of first impression and should be decided. (*id.*, at 111.) It then held that the requirement of examination expressly included a party, by that name, as the defendant here is a "party," (*id.*, at 112) and "an opposing party *vis-a-vis* the movant." (*id.*, at 115.) However, the "in controversy" and "good faith" requirements of the rule, are conditions precedent to the entry of an order for such examinations. (*id.*, at 121.) It then remanded the case to the trial court (at 122) to determine the "in controversy" and "good faith" of the movant, because the defendant has not "affirmatively put into issue his own mental and physical condition * * *." (at 121.)

Justice Douglas dissented from the remandment part of the decision. (at 124.) He argued that a plaintiff cannot refuse to submit to examination because he has already chosen "between his privacy and his purse." (at 126.) But, a person, made a party to a lawsuit, has a right to keep his person inviolate, when someone else has drawn that person's physical or mental condition into question. Persuasively, this should be because "of the great potential of blackmail." (at 126.)

No better illustration of that can be seen than in the case at bar. Here, a woman who has done nothing but lose her investment over a period of fifteen (15) years, must submit her mental condition to hostile experts, for the purpose of them testifying for the plaintiffs that she has suffered an "imperfection * * * of mentality."

Unless this court limits the scope of Rule 215 to those cases, where the litigant himself has put his condition (mental or physical) in issue, there is no foreseeable limitation to the mischief it can engender. It has been suggested that before a female complaining witness to any criminal assault be permitted to take her case to court, she must submit to a mental examination. 1957, Law Forum 651, 653. It has been urged that physical and mental examinations "can be of great value in * * * matrimonial and custody controversies." 1962, Law Forum 601, 602.

The scope of the danger was delineated by Justice Douglas, in *Schlagenhauf*, when he pointed out, that:

> When defendant's doctors examine plaintiff they are normally interested in answering a single question: did plaintiff in fact sustain the specific injuries claimed? But plaintiff's doctors will naturally be inclined to go on a fishing expedition in search of *anything* which will tend to prove that the defendant was unfit to perform the acts which resulted in plaintiff's injury.

> And a doctor for a fee can easily discover something wrong with any patient * * *. Once defendants are turned over to * * * psychiatric clinics for an analysis of * * * the condition of their psyche, the effective trial will be held there and not before a jury. (379 U. S. at 125.)

The foregoing is the crying injustice of the trial below. The petitioner admitedly had lost her money in investments and business ventures, which were rational and feasible in this record. She threatened to become a burden and an embarrassment to the respondents. Their zeal to prove her "deterioration or imperfection of mentality," was assured once they had forced her to their psychiatric examiners. (See, Dr. Szasz's letter, R. 418.)

However, petitioner steadfastly refused to put her mental condition "in controversy," therefore, the respondents' efforts to trap her lacked the "good faith" required by the rule.

The sanction applied here, which deprived petitioner of her right to defend herself violated her constitutional right to due process of law. The sanction applied under the circumstances here has not been tested in any court, so far as research of the law is able to discern. Thus, we argue basically against the manifest unfairness of the action here.

The essence of constitutional due process is "fair play." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. The legislatures federal and state may not constitutionally enact laws "that shock the sense of fair play." *Galvin* v. *Press*, 347 U. S. 522, 630. This principle extends to the courts. "A fair trial in a fair tribunal is a basic requirement of due process." *Holt* v. *Virginia*, 381 U. S. 131, 136.

The petitioner here had her sanity willy-nilly dragged into question by persons, who had already sworn in a verified complaint (R. 13), that she was incompetent. Because she refused to submit her sanity to a doctor of their own

choosing, she was denied the right to defend herself against them. Since "a doctor for a fee can easily discover something wrong with any patient" (379 U. S. at 125), the gross unfairness of the sanction here, shocks a sense of fair play." *In re Murchison*, 349 U. S. 133, 136-37.

CONCLUSION.

WHEREFORE, petitioner prays that a writ of certiorari issue to the Supreme Court of Illinois, to review the judgment of the courts below.

Respectfully submitted,

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APPENDIX.

—Docket No. 40229—Agenda 41—November, 1969.

In re Conservatorship of the Estate of Ellen Borden Stevenson.—(Ellen W. Carpenter *et al.*, Appellees, *vs.* Ellen Borden Stevenson, Appellant.)

Mr. Chief Justice Underwood delivered the opinion of the court:

Pursuant to a jury verdict in the circuit court of Cook County, the defendant, Ellen Borden Stevenson, was adjudicated an incompetent, and a conservator for her estate was appointed. She appeals directly to this court.

The plaintiffs, who are the three sons and the mother of the defendant, instituted this action by filing a petition alleging that the defendant was incapable of managing her estate because of an imperfection of mentality within the meaning of section 112 of the Probate Act (Ill. Rev. Stat. 1965, ch. 3, par. 112,) and praying for the appointment of a conservator for her estate. The petition further alleged that defendant suffered from mental and emotional disturbances which caused her to manifest extreme jealousy, suspicion and hostility toward the plaintiffs and others; that as a result of her condition, her estate had diminished by $400,000 over a 14-year period to a point where her assets totaled $100,000, with liabilities in excess of $80,000; that she did not have sufficient funds to pay taxes and other current debts, although plaintiffs had given defendant substantial sums to assist her financially; that she was being harassed by numerous creditors; that she was unable to properly manage her estate; and that due to her condition,

her estate was liable to immediate further waste and loss if it remained under her control. In her answer defendant denied substantially all of plaintiffs' material allegations.

Plaintiffs then presented a verified petition for a pretrial mental examination of the defendant pursuant to Illinois Supreme Court Rule 17—1 (now Rule 215, Ill. Rev. Stat. 1969, ch. 110A, par. 215). The petition was supported by an affidavit containing a transcript of a telephone conversation between defendant and one of the plaintiffs. Over the objections of defendant, an order was entered directing defendant to submit to a mental examination. She refused to submit to the examination and also failed to comply with the court's order directing her to submit to a discovery deposition relative to her financial affairs. As a consequence of her failure to comply with these orders, an order was entered pursuant to Supreme Court Rule 19-1 (now Rule 219; Ill. Rev. Stat. 1969, ch. 110A, par. 219) debarring defendant from maintaining any defense at the trial relative to her mental condition and ability to manage her financial affairs.

At the trial, testimony was introduced by plaintiffs concerning defendant's financial difficulties over a period of years. There was evidence that the defendant was heavily in debt and had insufficient income to meet her current expenses; that an art center operated by her had closed; that her investments in securities with borrowed money had resulted in forced liquidation of the securities; that mechanic's liens and Federal tax liens of substantial amounts had been filed against her and were being foreclosed; that a mortgage on her home had been foreclosed; and that for a period of time plaintiffs had themselves contributed substantial sums toward the payment of defendant's bills, but that defendant had refused further attempts by plaintiffs to assist her.

There was testimony concerning defendant's conversations with her children and grandchildren and evidence of

various personal incidents involving defendant and the plaintiffs. One of the plaintiffs testified that he received numerous telephone calls from defendant at various times of the day and night, some of which he recorded in his home with dictating equipment on the advice of counsel. Over defendant's objections, recordings of a portion of some of these conversations were put in evidence and played for the jury. Other witnesses testified that these conversations were similar to ones they had with defendant as a result of calls from her. Certain letters written by defendant were also put in evidence.

Dr. William Offenkrantz, a psychiatrist testified for the plaintiffs as an expert witness. In response to a hypothetical question based on the evidence, he testified to the effect that defendant suffered from an imperfection and deterioration of mentality.

Defendant first argues that the trial court improperly ordered her to submit to a pretrial mental examination pursuant to Supreme Court Rule 17—1 (now Rule 215) since her mental condition was not "in controversy" within the meaning of that rule and furthermore, that the requisite "good cause" for the examination had not been shown. She further argues that she has done nothing in this case to affirmatively put her mental condition in issue and relying on *Schlagenhauf v. Holder*, 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234, she urges that Rule 215 should not permit discovery in a case of this type, but should be limited to those cases where the party whose examination is sought has in some manner affirmatively raised the question of his physical and mental condition. We do not concur with defendant's suggestion that Rule 215 should be so limited in scope nor do we think that the *Schlagenhauf* case suggests such a limitation.

Our Rule 215 provides in pertinent part that "In any

action in which the physical or mental condition of a party or of a person in his custody or legal control is in controversy, the court upon notice and for good cause shown on motion made within a reasonable time before the trial, may order the party to submit to a physical or mental examination by a physician * * *."

Rule 215 is a rule of discovery, the purpose of which is to permit the discovery of facts which will assist the trier of fact to reach a correct determination of the issues before it. This rule does not permit unlimited and indiscriminate mental and physical examination of persons but by its terms gives a trial court discretion to order such examinations only when certain requirements are met. The person sought to be examined must be a party (or a person in his custody or legal control), the physical or mental condition of that person must be in controversy, and good cause must be shown for the examination. Then, and only then, is discovery of that person's physical or mental condition authorized by this rule.

The need for careful application of the "in controversy" and "good cause" limitations of the rule is particularly evident in a case of this type where the person sought to be examined has not raised the issue of his physical or mental condition (*Schlagenhauf v. Holder*, 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234). But to limit the scope of Rule 215 as defendant suggests would not be consistent with either the letter or intent of the rule. Discovery of a person's mental or physical condition may be just as appropriate in a case where the party sought to be examined has done nothing to put his condition in issue as in a case where the party sought to be examined has affirmatively raised his condition either in support of or in defense of a claim. Rule 215 contemplates that the trial court in its discretion may order the physical or mental examination under appropriate conditions when all requirements of the rule have been met,

irrespective of who has raised the issue of the person's physical or mental condition.

In the *Schlagenhauf* case, the United States Supreme Court construed its Rule 35 which is substantially identical to our Rule 215. In that case the court held that the physical and mental examinations which were there sought were improperly ordered by the trial court since the pleadings and motion for examination did not show that the mental condition of Schlagenhauf was truly "in controversy" or that "good cause" had been shown for the very broad physical examination which was sought. Nevertheless, we think the opinion clearly indicates that if these two requirements had been met, the examinations would have been properly ordered, albeit the Schlagenhauf himself had not raised the issue of his physical or mental condition.

In the case before us, the pleadings show without question that the mental condition of the defendant is "in controversy" insofar as it affected her ability to manage her estate. Also, we think that plaintiffs' motion for mental examination of the defendant, when considered with the supporting affidavits, furnishes showing of "good cause" for such examination. In our opinion, the trial court did not abuse its discretion in ordering the mental examination of defendant and in imposing the sanctions it did upon her refusal to comply with its order.

Defendant next challenges the constitutionality of section 112 of the Probate Act which provides the definition of an "incompetent" for purposes of that Act. Section 112, insofar as it is here pertinent, states that "An 'incompetent' under this Act includes any person who because of insanity, mental illness, mental retardation, old age, physical incapacity, or imperfection or deterioration of mentality, is incapable of managing his person or estate * * *." (Ill. Rev. Stat. 1965, ch. 3, par. 112.) Defendant urges that

the statute is vague, indefinite and uncertain; that the words "imperfection of mentality" have no ascertainable meaning; and that to appoint a conservator for a person who is found to be suffering from an "imperfection of mentality" deprives that person of the constitutional guarantees of due process of law under the State and Federal constitutions.

We do not concur with defendant's construction of the statute. This provision of the Probate Act is concerned with the appointment of a conservator for a person who for any of the reasons enumerated in the statute is incapable of managing his person or estate. The justification for the appointment of a conservator is founded primarily on the incapability of managing one's person or estate and not on the cause of that incapability. (*Loss* v. *Loss*, 25 Ill. 2d 515; *MacDonald* v. *La Salle National Bank*, 11 Ill. 2d 122.) Thus, in the case before us, it is not the imperfection of mentality *per se* which would justify the appointment of a conservator, but rather the inability to manage one's estate due to such imperfection of mentality. When read in the context of the statute, the phrase "imperfection of mentality" is not vague, indefinite or uncertain. We are of the opinion that section 112 provides sufficiently definite and clear standards for men of ordinary intelligence to determine the competency of a person under the provisions of the Probate Act. The statute does not possess the constitutional infirmities which defendant suggests.

Defendant next urges that prejudicial error resulted from the introduction in evidence of the recordings of telephone conversations between one plaintiff and the defendant. She contends that the recordings were made without her consent and that under this court's decision in *People* v. *Kurth*, 34 Ill. 2d 387, the recordings were therefore obtained in violation of the eavesdropping statute

(Ill. Rev. Stat. 1965, ch. 38, par. 14—1 *et seq.*) and pursuant to that statute were inadmissible in evidence.

The eavesdropping statute in effect at the time the telephone recordings were made in this case provided in pertinent part that "A person commits eavesdropping when he: (a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; * * *." (Ill. Rev. Stat. 1965, ch. 38, par. 14—2(a).) It is absolutely clear that this statute does not prohibit the recording of a telephone conversation between two parties where both parties have consented to such recording. There was testimony in this case that the defendant was informed that her telephone conversations were being recorded, and defendant herself indicated in the conversations that she too was recording the conversations. We think that the record supports the conclusion that defendant acquiesced in the recording of the telephone conversations in question, and in our opinion, such acquiescence constitutes consent for purposes of the eavesdropping statute. We find no error in the admission of the recordings in evidence.

We do not agree with defendant's final contention that there was no evidence to justify the jury's findings of incompetency. Our examination of the record leads us to the conclusion that there was sufficient evidence to support the jury's verdict and to justify the appointment of a conservator for defendant's estate.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Mr. JUSTICE SCHAEFER took no part in the consideration or decision of this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted]. 1970

No. [redacted]

ELLEN BORDEN STEVENSON,
Petitioner,

vs.

ELLEN W. CARPENTER, ADLAI E. STEVENSON III, BORDEN STEVENSON AND JOHN FELL STEVENSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT.

Petitioner argues two points, first that the definition of an "incompetent" in the Illinois Probate Act is unconstitutionally vague, and second that Petitioner was denied her right of defense and, hence, deprived of her property without due process of law. These arguments are without merit, have been properly answered by the Supreme Court of Illinois and plainly do not raise federal questions of any substance which would justify the grant of certiorari in this case.

Question 1. The Petition is totally devoid of any authority for the contention that Section 112 of the Illinois

Probate Act (Ill. Rev. Stat. 1963, ch. 3, § 112) or any similar statute of any other state is unconstitutionally vague. Section 112 defines an incompetent, in pertinent part, as ". . . any person who because of old age, physical incapacity, or imperfection or deterioration of mentality, is incapable of managing his person or estate. . . ." The Illinois courts have consistently upheld the constitutionality of this Section, as is shown in the opinion of the Illinois Supreme Court, 44 Ill. 2d 525 (1969). In one Illinois case directly in point, and involving the issue of incompetency by reason of mental imperfection, *MacDonald* v. *La Salle National Bank*, 11 Ill. 2d 122 (1957), an appeal was taken to this Court and the appeal dismissed for want of a substantial federal question, 355 U. S. 271 (1957). In sum, Petitioner's emphasis upon "imperfection of mentality" is both erroneous and misplaced. As the Illinois Supreme Court held in the instant case, "[t]he justification for the appointment of a conservator is founded primarily on the incapability of managing one's person or estate and not on the cause of that incapability." 44 Ill. 2d at 531.

Question 2. Petitioner contends that she was deprived of her property without due process of law because of a court order debarring her from presenting certain defenses at the hearing. This order was entered because of her refusal to submit to a court-ordered mental examination as well as her refusal to comply with court orders requiring her oral deposition and the production of documents. Petitioner, although well represented by counsel, refused to comply with any of the trial court's pre-trial orders.

Petitioner's argument that the order requiring her mental examination was improper and resulted in a deprivation of due process flies directly in the face of this Court's decision in *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964). The opinion of the Illinois Supreme Court dealt

fully with this issue. Respondents were well aware of the *Schlagenhaitf* decision when they moved for a mental examination of Petitioner, and were guided accordingly. The issue of Petitioner's mental coiglition was plainly "in controversy" and "good cause" (not "good faith" as Petitioner persists in misstating tlfis test) was clearly established. Illinois Supreme Court Rule 17-1 (Ill. Rev. Stat. 1963, ch. 110, § 101.17-1). Where, as here, a party's mental condition as it affects her ability to manage her estate is the central issue in the case, and the moving parties have advanced specific and detailed evidence that the other party's mental faculties are impaired, it can hardly be denied that the "good cause" standard is satisfied.

Petitioner's argument that the trial court's barring of certain defenses was improper and that Petitioner was denied her day in court is erroneous for two reasons. First, Petitioner not only refused to submit to the mental examination but also refused to comply with every other pre-trial order requiring her deposition and the production of documents, the latter refusals alone being sufficient to justify the sanction imposed. Second, Respondents specifically waived the sanction in open court and Petitioner, in fact, presented evidence in her defense (R. 1668-1669) as part of a four-day hearing before a jury, at which hearing Respondents introduced substantial documentary evidence and oral testimony clearly supporting the finding and order of incompetence.